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CHARLES ELMORE C

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1929.

(No. 579, October Term, 1928.)

INTERNATIONAL SHOE COMPANY,
Appellant,

vs.

STRATTON SHARTEL, Attorney-General, et al.,
Appellees.

REPLY OF THE APPELLANT TO SUGGESTIONS OF APPELLEES IN OPPOSITION TO PETITION FOR REHEARING.

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JAMES D. WILLIAMSON,
R. E. BLAKE,
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The appellees in the above case have filed suggestions in opposition to appellant's petition for rehearing, and give three suggested reasons why the petition for rehearing should not be granted. These suggestions are as follows:

I.

That Section 12 of the Missouri Stock Corporation Act, passed by the General Assembly in 1921, applies to appel-

lant, a foreign corporation, as to franchise taxes, because of Section 9790, Revised Statutes of Missouri 1919.

II.

That the Missouri annual franchise tax is not a tax on property, but is a tax on the privilege of doing business in the state, and the tax amounts to five cents per share on the proportionate part of shares of non-par value stock used, in business in the state, by a foreign corporation.

III.

That no tax is computed on the surplus of a corporation having no par shares, because a corporation with no par shares can have no surplus.

We will answer the suggestions in their order.

First. Revised Statutes of Missouri, Section 9790, so far as it can be pertinent here, is as follows:

> "9790. Every corporation for pecuniary profit formed in any other state, territory or country, before it shall be authorized or permitted to transact business in this state, or to continue business therein if already established, shall have and maintain a public office or place in this state for the transaction of its business, where legal service may be obtained upon it, and where proper books shall be kept to enable such corporation to comply with the constitutional and statutory provisions governing such corporation; and such corporation shall be subjected to all the liabilities, re-

strictions and duties which are or may be imposed upon corporations of like character organized under the general laws of this state, and shall have no other or greater powers."

This statute has no reference whatever to taxation or franchise taxes. Such taxes are covered by specific legislation, and it is a familiar rule of statutory construction that, when there is a specific statute in reference to matters of taxation, that statute controls, rather than a general law.

The Supreme Court of Missouri, in the case of State v. Pierce Petroleum Co., admitted that section 12 did not apply to foreign corporations.

Second. The Missouri Annual Franchise Tax is admitted to be a tax for the privilege of doing business within the state. The law fixes the basis of the tax. It is based on that portion of the par value of the outstanding capital stock and surplus represented by the proportion of property and assets in the State of Missouri. That is taxed at the rate of one-twentieth of one per cent. The tax is both upon capital stock and surplus. It is based on par value. There is no hidden meaning in the words "par value." "Par" means "equal." The Courts have had occasion to define par value of capital stock. "It is the amount which has actually been paid in the treasury for the stock" (Commonwealth v. Lehigh Avenue R. R. Co., 129 Pa. State 405, l. c. 415-416).

"The capital stock and the shares of capital stock are distinct things. The capital stock is the money paid or

authorized or required to be paid in as a basis of the business and the means of conducting its operation. It represents whatever it may be invested in" (Farrington v. Tennessee, 95 U. S., l. c. 686).

The Missouri tax is based upon money value of outstanding capital stock and surplus, not on number of shares, nor on outstanding shares, nor the value of the shares.

Surplus is so well known that definition is unnecessary.

Third. The third suggestion is that a corporation having no par stock can have no surplus. How can this be true? How can undistributed earnings or profits, or paid-in surplus, become capital stock without express corporate action by which capital stock is increased? The laws of Delaware expressly provide that the directors shall determine the capital stock as to no par shares; in this case this has been done, and the appellees admit it. If earnings or profits automatically become capital stock, how can dividends be paid? The laws of both Delaware and Missouri prohibit the payment of dividends from capital stock.

To state the proposition answers it.

We submit the motion for rehearing is well founded and should be granted.

Respectfully submitted,

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